

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9657 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

VAN OORD ACZ INDIA PVT. LTD.

Versus

GUAJRAT ADANI PORT PVT. LTD.

Appearance:

1. Special Civil Application No. 9657 of 2004
MR BD KARIA for Petitioner
M/S TRIVEDI & GUPTA for Respondent

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision: 13/09/2004

C.A.V. JUDGEMENT

1. The present writ petition has been preferred by the petitioner against the order passed by the Learned Designate of the Hon'ble Chief Justice of this High Court

under Section 11(6) of the Arbitration and Conciliation Act, 1996 dated 6th July, 2004 in petition under Arbitration Act No.30 of 2003.

2. An interesting question of law has been raised in the present petition to the effect that whether the High Court under Article 226 of the Constitution of India can go into the details of an agreement between the parties and should decide the existence or otherwise of a clause "international commercial arbitration" in the agreement especially when [i] the existence of such clause in the agreement is disputed by the respondent; and [ii] an Arbitrator has already been appointed, by this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 or instead of concluding by the High Court as to the existence or otherwise of a clause "international commercial arbitration" in the agreement, should it be left open, for the parties, to raise the said contention before the Arbitrators on the basis of facts, (which may be settled upon the evidence to be taken before them).

3. The facts leading to the present case are as under :-

The petitioner is challenging, an administrative order passed by the learned Nominee of the Hon'ble the Chief Justice of this Court appointing third arbitrator, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter be referred to as the "Act, 1996" for the sake of brevity) The respondent moved the petition for the appointment of third Arbitrator under Section 11 of the Act, 1996 before the Learned Designate of the Hon'ble Chief Justice of this Court. Upon hearing both the parties, an administrative order has been passed dated 6th July, 2004 under Section 11(6) of the said Act, 1996, whereby the Hon'ble Mr.Justice G.T.Nanavati (retired Judge of the Hon'ble Supreme Court of India) has been appointed as third Arbitrator. The agreement between the parties is having an Arbitration Clause, which reads as under :-

"Clause 20.6 Arbitration : Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both the parties:

- (a) There shall be three arbitrators;
- (b) The language to be used in the

- arbitration shall be English;
- (c) The place of arbitration shall be Ahmedabad with jurisdiction restricted to the Gujarat High Court;
- (d) The arbitration shall be carried out in accordance with the laws of India.

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

Any dispute in respect of which amicable settlement has not been reached within the period stated in sub-clause 20.5 shall finally and conclusively be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and by other enactments or modification thereto which shall be deemed to be incorporated herein by reference to this sub clause."

4. It is contended by the learned advocate appearing for the petitioner that the petition preferred by the respondent under Section 11(6) of the said Act, 1996, is not tenable at law and, therefore, the order passed by the Learned Designate of the Hon'ble Chief Justice of this Court deserves to be quashed and set aside. It is also submitted by the learned advocate appearing for the petitioner that it was an obligatory on the part of the Learned Designate to arrive at a conclusion on the basis of the plain interpretation of the agreement that there is an existence of "international commercial arbitration" - clause in the agreement and, therefore, under Section 11(12) of the said Act, 1996 only the Hon'ble Chief Justice of India can appoint third Arbitrator, this aspect of the matter has not been appreciated and

therefore, the impugned order passed under Section 11(6) of the said Act, 1996 deserves to be quashed and set aside. It is also contended by the learned advocate appearing for the petitioner that the Learned Designate has not properly appreciated an order passed by previous Learned Designate in Civil Application No.160 of 2003 in Petition Arbitration Act No.30 of 2003 dated 15th December, 2003 whereby while passing an administrative order of appointment of third Arbitrator, it is observed "..... this is not a simple question of appointment of third Arbitrator, but this forum has to determine jurisdictional facts" (para-17 of the judgement in Civil Application No.160 of 2003 in Petition Arbitration Act No.30 of 2003). The Learned Designate has not properly appreciated this aspect of the matter and hence, the impugned order deserves to be quashed and set aside. The learned advocate for the petitioner further submits that the decision of the Learned Designate under Section 11(6) of the said Act, 1996 is an administrative decision and hence, is amenable to the writ jurisdiction under Article 226 of the Constitution of India. The learned advocate for the petitioner submits that the chosen mode of dispute resolution between the parties is an international commercial arbitration within the meaning of Section 2(1)(f) of the Act as is clear from the contract. It is further submitted that Section 2(1)(f) permits an arbitration between two Indian parties to be an international commercial arbitration if the control and management of one of the parties is carried out outside India. The petitioner submits that its control and management is carried outside India as is evident from the following:

- [a] the board of directors of the petitioner consists of three Dutch domiciled directors.
- [b] all the shares of the petitioner, except one are held by Van Oord Marine Contractors BV, a Dutch Company.
- [c] two of the directors of the petitioner are common to the Board of Van Oord Marine Contractors BV.
- [d] the correspondence exchanged between the parties discloses that even the applicant knew that the control and management of the petitioner is carried out in Netherlands, which is established from the following:

- [i] the respondent was corresponding with the petitioner in Netherlands post assignment;
- [ii] the Board in Netherlands was actively negotiating the documents between the

parties, including the format of the L/C,
which was fundamental to the contract;
[iii] the Board gave directions to the commence
activities of dredging under the
Contract.

[e] In addition to the aforesaid the petitioner has
been held to a permanent establishment by the
DDIT, Intl. Taxation, New Delhi vide order dated
04.03.2002 (wrongly dated 04.03.2001) for the
reasons set out in para-8 and 9 of the said
order.

The learned counsel for the petitioner submits
that in light of the judgements in DE BEERS CONSOLIDATED
CO. Vs. HOWE, 1906 AC 454 at 459; NAROTTAM AND PAREKH
LTD. Vs. CIT, AIR 1954 Bom 67 at paras 2-3; the
petitioner's controlling mind and brain is situated
outside the country in Netherlands.

It is also submitted by the learned counsel for
the petitioner that the respondent has not disputed the
documents on record except the order of the DDIT, which
order cannot be reapprised by the Hon'ble Delegate of the
Hon'ble Chief Justice of Gujarat High Court in the
present proceedings. Without Prejudice the petitioner
further submits that the only ground to assail the
findings is the number of employees, which is not only
frivolous but also misleading. The order in its express
terms notes that the conclusion on the issue of permanent
establishment as set out in para-9 of the Order are
without prejudice to the number of employees mentioned in
the Order, which establishes that the DDIT had proceeded
to decide the issue based on material other than the
number of employees of the petitioner.

The aforesaid aspect of the matter has not been
appreciated by the Learned Designate, while passing an
order under Section 11(6) of the said Act, 1996 and
hence, the impugned order deserves to be quashed and set
aside.

5. The learned advocate appearing for the respondent
mainly submits that existence of clause "international
commercial arbitrator" within the meaning of Section 2(f)
of the said Act, 1996 in an agreement between the parties
is disputed by the respondent. For existence of
"international commercial arbitration" - clause, this
Court must arrive at a conclusion that "Central
Management and Control of petitioner Company is exercise
in any country, other than India". The aforesaid
question is highly disputed question of fact, some of the

Directors may reside abroad, but there may be a case wherein one of the Director, who is residing in India may be Managing and Controlling the affairs of the petitioner Company. The management and effective control is really lying, whether at abroad or within India, cannot be established without laying proper evidence and, therefore, the function of settlement of facts and to arrived at a conclusion as to whether de facto, the Central Management and Control, of the petitioner Company is exercised in any country other than India, is a function to be left open, for the Arbitrator to decide and this Court should not close this most vital and important arguments of the respondent by concluding as to existence or otherwise of "international commercial arbitration" within the meaning of Section 11(2) of the said Act, 1996 in an agreement between the parties. It is also contended by the learned advocate for the respondent that the order passed by the Learned Designate under Section 11(6) of the Act, 1996 deserves, not, any interference in exercise of extra ordinary jurisdiction conferred upon this Court under Article 226 of the Constitution of India. All the points as to Qualifications of Arbitrator; Independence or impartiality of Arbitrator or in respect of the jurisdiction of the Arbitrator or in respect of existence of the arbitration clause or the interpretation of the arbitration clause etc., can be raised before the Arbitrators. Hence, the order passed by the Learned Designate requires no interference in exercise of extra ordinary jurisdiction of this Hon'ble Court. Especially, when the dispute as to the existence of "international commercial arbitration" - clause, within the meaning of Section 2(f) of the said Act, 1996 in an agreement, can be raised before the Arbitrators.

6. I have perused the papers on record and an administrative order passed by the Learned Designate under Section 11(6) of the said Act, 1996 whereby third Arbitrator has been appointed. Section 11 of the said Act, 1996 reads as under :-

11. APPOINTMENT OF ARBITRATORS - (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
- (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
- (3) Failing any agreement referred to in sub-section (2), in an arbitration with three

arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and -

- (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment.

the appointment shall be made, upon request of a party, by the Chief justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties -

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure.

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section

- (6) to the Chief Justice or the person or institution designated by him is final.
- (8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to -
- (a) any qualifications required of the arbitrator by the agreement of the parties; and
- (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
- (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
- (10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.
- (11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Court or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.
- (12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".
- (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in Cl. (e) of sub-section (1) of Sec.2 is situate and, where

the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

7. Similarly, international arbitration agreement has been defined under Section 2(f) of the said Act, 1996, reads as under :-

"2(f) "International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is -

- (i) an individual who is a national of, or habitually resident in, any country other than India; or
- (ii) a body corporate which is incorporated in any country other than India; or
- (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country;"

8. One fundamental aspect to be kept in mind, while appointing of third Arbitrator under Section 11 of the said Act, 1996 is not to conclude or foreclose any of the contentions of either party to an agreement including -

- I. Qualifications of the Arbitrator;
- II. Independence of the Arbitrator;
- III. Impartiality of the Arbitrator;
- IV. Any objections as to the existence of an enforceable arbitration valid agreement;
- V. Legality, propriety and validity of the Constitution of the arbitral tribunal;
- VI. Jurisdiction of the arbitrator;
- VII. Interpretation of any clause of the agreement especially when the same is based upon highly disputed question of fact which may include "international commercial arbitration" - clause or
- VIII. Other questions similar to the aforesaid disputed questions of fact.

9. The aforesaid aspect of the matter has been time and again annunciated by the Hon'ble Apex Court in several judicial pronouncements, especially in the case of KONKAR RAILWAY CORPORATION LIMITED VS. MEHUL CONSTRUCTION COMPANY, reported in (2000) 7 S.C.C. 2001, wherein it has observed in para-4 as under :-

"..... The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimize the supervisory role of courts in the arbitral process. If a comparison is made between the language of Section 11 of the Act and Article 11 of the Model Law it would be apparent that the Act has designated the Chief Justice of a High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of arbitrator whereas under the Model Law the said power has been vested with the Court. When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator, and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same....."

10. It is also held by the Hon'ble Supreme Court in the case of GRID CORPN. OF ORISSA LTD. VS. AES CORPN. AND OTHERS, reported in (2002) 7 S.C.C. 736, in para-25, which reads as under.

"In Konkarn Rly. Corpn. Ltd. it has been held (vide para-21) that in spite of an appointment having been made by the Chief Justice or his designate, an objection as to the constitution of the Arbitral Tribunal being improper or without

jurisdiction is capable of being raised before the Arbitral Tribunal itself under Section 16 of the Act, for an objection not only as to the width of jurisdiction but also one going to the very root of its jurisdiction is entertainable by the Arbitral Tribunal under Section 16. That being so, assuming without holding that there is any substance in the plea of the petitioners, it is open for them to raise the same before the Arbitral Tribunal....."

11. In the another case of FOOD CORPORATION OF INDIA VS. INDIAN COUNCIL OF ARBITRATION & ORS., ETC.ETC., reported in JT 2003 (5) S.C. 480, wherein it has been held by the Hon'ble Supreme Court in para-12 which reads as under :-

"12 Adverting to section 16 of the 1996 Act the constitution bench also held that questions relating to the improper constitution of arbitral tribunal or its want of jurisdiction or objections with respect to the existence or validity of the arbitration agreement are matters which should be canvassed before the arbitral tribunal itself which has been specifically empowered to rule on such issues and on its own jurisdiction, as well. Unfortunately, the High Court in this case seems to have proceeded to adopt an adjudicatory role and returned a verdict recording reasons as to the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator....."

It is further observed by the Hon'ble Supreme Court in the aforesaid case in para-14 which reads as under :-

14 As indicated earlier even assuming without accepting for purposes of consideration that there is any infirmity in the arbitration clause which go to undermine as claimed by the respondents the legality, propriety and validity of the constitution of the tribunal and/or even if there be any objections as to the existence of an enforceable or valid arbitration agreement, it had to be adjudicated by the very arbitral tribunal after a reference is made to it on being so constituted and it is not for the ICA or the

learned judge in the High Court to undertake this impermissible adjudicatory task of adjudging highly contentious issues between the parties"

12. It has been held by the Hon'ble Supreme Court in the another case of STATE OF ORISSA & ORS. VS. GOKULANANDA JENA, reported in 2003 (5) Scale 543, in para-8 as under :-

"However, we must notice that in view of Section 16 read with Sections 12 and 13 of the Act as interpreted by the Constitution Bench of this Court in the M/s.Konkan Railway (supra) almost all disputes which could be presently contemplated can be raised and agitated before the Arbitrator appointed by the Designated Judge under Section 11(6) of the Act. From the perusal of the said provisions of the Act, it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge. If that be so, since an alternative efficacious remedy is available before the Arbitrator, writ court normally would not entertain a challenge to an order of the Designated Judge made under Section 11(6) of the Act which includes considering the question of jurisdiction of the Arbitrator himself. Therefore, in our view even though a writ petition under Article 226 of the Constitution is available to an aggrieved party ground available for challenge in such a petition is limited because of the alternative remedy available under the Act itself."

13. In the another decision in the case of HYDRO POWER CORPORATION LIMITED VS. DELHI TRANSCO LTD, reported in 2003 (5) Scale 590, in para-11 as under :-

"11. Keeping in view the law as settled by this Court, the designate of the Chief Justice acting under Section 11 of the Act and the Division Bench of the High Court in exercise of power under Article 226 of the Constitution both acted under a misconception of law and wrongly held that the disputes were not referable to the arbitration. The appellant sought reference of its disputes with the respondent/company for adjudication through the arbitration in

accordance with arbitration clause in the alleged agreement arrived at between them. Whether on the facts mentioned above an arbitration agreement can be said to have existed by recourse to arbitration clause in NIT was itself a dispute which deserved to be referred to the Arbitral Tribunal in accordance with the arbitration clause. Section 17 empowers the Arbitral Tribunal to decide the question of existence and validity of the arbitration agreement."

14. In light of the aforesaid decisions of the Hon'ble Apex Court, the Qualifications of Arbitrator, Independence of Arbitrator, Impartiality of the Arbitrator or the dispute as to the existence of enforceable Arbitration Agreement, Jurisdiction of arbitrator, Legality, Propriety and Validity of the constitution of Arbitral Tribunal, can be raised before the arbitrators appointed under Section 11 of the said Act, 1996 mainly because of the fact that the said dispute can be settled on the basis of the evidence led before the Arbitrator. Similarly, in the present case, whether the agreement is having International Commercial Arbitration clause or not ? That much depend upon the settlement of the facts of the case, and an interpretation of the agreement keeping in mind Section 2(f) of the said Act, 1996 which requires the existence of "the Central Management and Control" of one of the parties, to the dispute, is exercised in any country, other than India. The words "Central Management and Control" and the exercise of the same in any country other than India of any one of the parties to the agreement is a disputed question of fact. So far as present petitioner is concerned, the learned advocate for the respondent has submitted that even if the some of the directors are residing at Abroad still the Central Management and Control can be exercised from and within the India, who has dealing with the day-to-day management and control, that is the matter of evidence to be led and proved before the Arbitrators. Merely because some shares are held by the foreigners mathematically and without any further additional evidence, it cannot be said conclusively that the Central Management and Control of petitioner - Company is exercised in the country other than India. As stated by the aforesaid judgments, it has always directed by the Hon'ble Supreme Court that the dispute as to the interpretation of the agreement should be allowed to be made by the Arbitrators themselves and not by the Court in a writ jurisdiction under Article 226 of the Constitution of India. Very limited is the scope

of the challenge. Once an Arbitrator is appointed under Section 11(6) of the said Act, 1996 in a writ petition under Article 226 of the Constitution of India the High Court cannot go into the question, which is highly disputed question of fact, especially of interpretation of the clause or clauses of the agreement. In the present case, the petitioner Company has also preferred Arbitration Petition No.15 of 2003 before the Hon'ble Supreme Court of India. The respondent had objected the Arbitration Petition No.15 of 2003 and it was pointed out to the Hon'ble Supreme Court of India that the respondent has preferred an Arbitration Petition No.30 of 2003 before this Court for an appointment of third Arbitrator under Section 11(6) of the said Act, 1996. Thus, the filing of the present Arbitration Petition before this Court, by itself, suggests the fact that there is a dispute as to the existence of International Commercial Arbitration clause in an agreement. Once there is a dispute as to the interpretation of the agreement clauses, coupled with a fact that an Arbitrator is already appointed under Section 11(6) by the Learned Nominee of the Hon'ble Chief Justice of the High Court, the dispute must be resolved by the Arbitrator. It is vehemently submitted by the learned advocate for the petitioners that in the present case, Section 11(12) is made applicable and not Section 11(6) of the said Act, 1996 and, therefore, the power to appoint the third Arbitrator can be exercised only by the Learned Nominee of the Hon'ble the Chief Justice of the Supreme Court of India. This attractive contention, if looked closely, will be found incorrect because as referred hereinabove, it has been held consistently by the Apex Court that the dispute as to the Qualification of Arbitrator, Independence of Arbitrator, Impartiality of the Arbitrator or the dispute as to the existence of enforceable Arbitration Agreement, as well as legality, propriety and validity of the Constitution of Arbitrator Tribunal, the jurisdiction of the Arbitrator can be raised before the Arbitrators. The Court ought not to conclude or foreclose, the aforesaid arguments of the parties. Thus, even if the Arbitrator is appointed under Section 11(12) of the said Act, 1996, the respondent can raise dispute as to the nonexistence of "International Commercial Arbitration" - clause in the agreement. Thus, in both the eventuality either of the party can raise a contention as to existence or otherwise of "International Commercial Arbitration" clause in an agreement and, therefore, rightly it has been observed by the Hon'ble Supreme Court in para-25 of the judgment delivered in the case of GRID CORPN. OF ORISSA LTD.. VS. AES CORPN. AND OTHERS, reported in (2002) 7 S.C.C. 736 to the

effect that an objection as to the constitution of the Arbitral Tribunal being improper or without jurisdiction is capable of being raised before the Arbitral Tribunal itself under section 16 of the Act, 1996 for an objection not only as to the width of the jurisdiction but also one going to the very root of its jurisdiction is entertainable by the Arbitral Tribunal under Section 16. That being so, assuming without holding that there is any substance in the plea of the petitioner, it is open for them to raise the same before the Arbitral Tribunal. Thus once Arbitral Tribunal has come into an existence it comes into existence for all purposes and to resolve all the disputes including the disputes referred in para-8 and they should be raised before the Arbitral Tribunal.

15. In view of the aforesaid facts and judicial interpretation of Section 11 of the said Act, 1996, a dispute as to the existence of "International Commercial Arbitration" can be raised before the Arbitrator. As per Section 2(f) of the said Act, 1996, this Court under extra ordinary jurisdiction conferred under Article 226 of the Constitution of India should not decide as to whether the petitioner Company's, the Central Management and Control is exercised in any country other than India or not. Holding the shares, payment of salary by the persons who are residing out of country is not a sole criteria for deciding the Central Management and Control of the petitioner - Company. Neither there is any mathematical test in an existence, under any law that when most of the directors, if are residing out of India, always the Central Management and control can be said to have been exercised in the country other than India. In my opinion, to arrive at a decision "as to the Central Management and Control of the petitioner - Company whether is exercised in any country other than India" (as per Section 2(f) of the said Act, 1996) is disputed question of fact which requires evidence to be led and certain facts are required to be proved, such an exercise must be undertaken by the Arbitrator. If the aforesaid conclusion arrived at by this Court, it tantamounts to adoption of a adjudicatory role which the Hon'ble Supreme Court has highlighted that the High Court should not perform adjudicatory role, in the case of FOOD CORPORATION OF INDIA VS. INDIAN COUNCIL OF ARBITRATION & ORS, ETC., reported in J.T. 2003 (5) S.C. 480, in para-11 which holds that "unfortunately, the High Court in this case seems to have proceeded to adopt an adjudicatory role and returned a verdict recording reasons as to the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an Arbitrator". It

was further observed in para-14 of the aforesaid judgment that "it is not for the ICA or the learned Judge in the High Court to undertake this impermissible adjudicatory task or adjudging highly contentious issues between the parties.

16. Thus, the question to the existence "International Commercial Arbitration" clause must be left open for the Arbitrators and Court ought not to decide the same as narrated hereinabove in both the eventualities namely -

[i] If the Arbitrator is appointed under Section 11(12) of the said Act, 1996 then the respondent will raise a dispute before the Arbitrators as to the nonexistence of International Commercial Arbitration Clause in the agreement;

[ii] If the Arbitrator is appointed under Section 11(6) of the said Act, 1996, then the petitioner will raise a dispute as to the existence of International Commercial Arbitration Clause before the Arbitrators.

17. Thus, in any of the aforesaid eventualities namely in a first, appointment by the Learned Nominee of the Hon'ble Chief Justice of India and in second eventuality, appointment of an Arbitrator by the Learned Nominee of the Hon'ble Chief Justice of the High Court, former under Section 11(12) and the later under Section 11(6) of the said Act, 1996, either of the parties is at liberty to raise the contention as to the existence or nonexistence of the International Commercial Arbitration clause in an agreement. An argument has been canvassed by the learned counsel appearing for the petitioner that in the present case, Section 11(6) is not applicable but Section 11(12) of the said Act, 1996 is applicable directly. But in my view Section 11(12) of the Act, 1996, may be applied directly in the cases like - when there is no dispute as to existence of "international commercial arbitration" clause in an agreement between the parties or when, once such arbitrator has been appointed under Section 11(12) and decision of Arbitrator has been accepted by the parties, and for second time if the dispute has arose and arbitrator is to be appointed or in such similarly situated circumstances. But in the present case existence of "international commercial arbitration" clause is in dispute, hence, the question of interpretation of Arbitration Clause should be left open for Arbitrators to decide and, therefore in my view once the Arbitrator is appointed under Section 11(6) of the said Act, 1996 by the learned Nominee of the Hon'ble

Chief Justice of the High Court, such dispute, must be raised before the Arbitrators.

18. In view of the aforesaid discussion, I see no merits in the present petition and hence, it requires to be dismissed and the same is dismissed. The impugned order passed by the Learned Nominee of the Hon'ble Chief Justice of High Court is true, correct, legal and in consonance with facts and circumstances of the case and requires not, any interference under extra ordinary jurisdiction conferred upon this Court under Article 226 of the Constitution of India.

[D. N. Patel,J.]

(vijay)